the Federal Court's decision in *Public Prosecutor* v. *Ismail bin Yusof*[3] and submitted that the lorry used must have been a "necessary" ingredient of the offence. Counsel then referred to the said Regulation 6(2) again and pointed out that an offence under that Regulation can be committed without the use of a lorry.

The learned deputy who was asked to address the Court submitted that the charge was correct but conceded that the lorry in this case did not come within the purview of section 14(1) of the Fisheries Act, 1963 (Revised 1978), which is as follows:-

"An order for the forfeiture or for the release of anything liable to forfeiture under this Act shall be made by the court before which the prosecution with regard thereto has been had and an order for the forfeiture of such thing shall be made if it is proved to the satisfaction of the court that –

(a) the offence committed is for –

(i) using any net, instrument, fishing material or appliance which is prohibited by or under this Act or any regulations or rules made thereunder; or

(ii) doing or carrying on an act without a licence or permit required under this Act or any regulations or rules made thereunder, and

(iii) that thing was the subject matter of, or was used in the commission of, the offence, notwithstanding that no person may have been convicted of such offence"

Having considered the arguments of both counsel, I considered that the conviction of the applicant's employees under Regulation 6(2) of the said Regulations was wrong because they did not take the undersized cockles for consumption within the meaning of that Regulation. They were merely carrying or transporting the cockles which had apparently been taken by MAJUIKAN under a licence granted to them under the said Regulations for consumption by their customers. In any case the use of the applicant's lorry was not a necessary ingredient of the said offence under Regulation 6(2) of the said Regulations and it was therefore not liable to forfeiture under section 14 of the Fisheries Act, 1963. In the circumstances, I therefore set aside the learned Magistrate's order of forfeiture and directed that the lorry be returned to the applicant.

Order accordingly.

Solicitors: *Yusuf Gulam Lee & Co.*

LEE LOOK v. PUBLIC PROSECUTOR

[A. Cr. J. (Gunn Chit Tuan J.) January 12, 1984]

[Kuala Lumpur – Federal Territory Criminal Appeal No. 80 of 1979]

Criminal Law and Procedure – Charge of trafficking in dangerous drugs – Cautioned statement recorded by investigating officer – Cautioned statement missing and not part of appeal record – Conviction of possession of dangerous drugs – Dangerous Drugs Act, 1952, ss. 12 & 39B.

Dangerous Drugs – Trafficking – Possession – Charge substituted – Order of whipping – Dangerous Drugs Act, 1952, ss. 12 & 39B.

The appellant appealed against his conviction for trafficking in dangerous drugs. The only evidence of trafficking was in the cautioned statement, which it appeared was recorded by the investigating officer. The cautioned statement was missing and did not form part of the appeal record.

Held: (1) in the circumstances as the cautioned statement was recorded by the investigating officer who was actively involved in the investigation the learned President should have as a matter of law and fact held that the cautioned statement was inadmissible in evidence as it might result in a miscarriage of justice;

(2) in any event the cautioned statement did not form part of the appeal record and on the recorded evidence in the appeal records there was therefore only evidence to prove that the appellant was guilty of an offence of possession of dangerous drugs;

(3) the conviction of the appellant for trafficking in dangerous drugs would be quashed and a conviction for the offence of possession of dangerous drugs substituted and the appellant sentenced to 3 years' imprisonment and 6 strokes of whipping.

Case referred to:-

(1) *Cheong See Leong* v. *Public Prosecutor* [1949] M.L.J. 67.

CRIMINAL APPEAL.

K. Chandra for the appellant.

Gooi Soon Seng (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Gunn Chit Tuan J.: The appellant, Lee Look, was charged in the Sessions Court Kuala Lumpur for trafficking in dangerous drugs, to wit, heroin weighing 15.29 grammes under section 39B(1) (a) of the Dangerous Drugs Act, No. 32/52, and was on July 11, 1979, convicted and sentenced to life imprisonment and two strokes of the rattan under sub-section (2) of section 39B of the said Act.

On appeal against conviction and sentence, Mr. K. Chandra, counsel for the appellant, stated that at the time of the alleged offence on December 6, 1978, the presumption of trafficking under section 37(da) of the said Act did not apply and the entire prosecution's case depended on the cautioned statement marked exhibit P.7. Counsel also informed the Court that although the learned President's judgment was undated it was only supplied to him about two years after the trial. He pointed out that the learned President had difficulty in stating the grounds on which the accused was found guilty of trafficking because the only evidence of trafficking was in the cautioned statement which somehow was missing soon after the case was completed and was not available at the time he wrote his judgment two years later. In any case, it was also the submission of counsel that the learned President should not have admitted the cautioned statement because it was recorded by the investigating officer (P.W.2) whom he pointed out was very involved in the investigation of the whole case and was therefore not unbiased when he recorded the cautioned statement.

The learned Deputy Public Prosecutor conceded that as a matter of prudence the investigating officer in this case should not have recorded the cautioned statement, but stated that the learned President had found that the statement made by the accused was voluntary. He also submitted that the investigating officer was not actively involved in the case.

Having perused the recorded evidence, I was satisfied and agreed with learned counsel for the defence that the investigating officer (P.W. 2) was definitely involved in the investigation of this case so that there was likelihood of bias on his part. The former Court of Appeal in *Cheong See Leong* v. *Public Prosectuor*[1] has held, *'inter alia'*, that the principle that a judicial officer who is interested in a case should not sit to adjudicate upon it applies in regard to interpreters. In that case, the former Court of Appeal also held that the use of the Detective Sergeant, who was fully conversant with the material facts and was subsequently called by the prosecution as their principal witness to prove those facts, as an interpreter in taking the statement from the appellant in that case, offended against the elementary ideas of justice and therefore no reliance could be placed on the accuracy of that statement. Similarly in this case, following the former Court of Appeal's decision in that case, I considered that the use of the investigating officer, who was actively involved in the investigation of the case and who was subsequently called by the prosecution as a witness, as a recording officer in taking the cautioned statement from the appellant resulted in the likelihood of bias on his part. In the circumstances the learned President should have as a matter of law and fact held that the cautioned statement was inadmissible in evidence as it might result in a miscarriage of justice. In any case, as the cautioned statement (P.7) was missing it did not form part of the appeal records available for my perusal as an appellate judge. On the recorded evidence in the appeal records there was therefore only evidence to prove that the appellant was guilty of an offence of possession of dangerous drugs under section 12(2) of the said Act. I therefore quashed the conviction of the accused under section 39B(1) (a) of the said Act and substituted therefore a conviction under section 12(2) read together with section 39A of the said Act. The sentence of life imprisonment and two strokes of the rattan was altered by me to a sentence of three years' imprisonment with effect from the date of conviction and I also ordered that the appellant be punished with whipping of not less than six strokes.

Order accordingly.

Solicitor: *K. Chandra & Co.*

RAHIM BIN USOFF & ORS. v. PUBLIC PROSECUTOR

[A.Cr. J. (Shankar J.) January 31, 1984]
[Johore Bahru – Criminal Appeal No. 30 of 1982]

Criminal Law and Procedure – Appeal – Appeal against sentence – Appellant absent at hearing – Criminal Procedure Code (F.M.S. Cap. 6), s. 313 (ii).

In this case the appellants appealed against sentence. One of the appellants was absent at the hearing.

Held: (1) there was no material upon the record to suggest that the learned Magistrate had erred in principle and the appeals against sentence should be dismissed;

(2) in regard to the appellant who was absent the Court directed that it will in the circumstances refuse to consider the appeal further and order that the appeal be dismissed.